IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/07/2003

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THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.907 of 2002

Manoharan .. Appellant

-Vs-

State by Inspector of Police
Perundurai Police Station
Erode District
Crime No.434 of 1991 .. Respondent

This criminal appeal is preferred under S.374(2) of The Code of Criminal Procedure against the judgment of the Additional Sessions Judge (Fast Track Court No.1), Erode in S.C.No.172 of 2001 dated 20.6.2002.

!For Appellant : Mr.N.Manokaran

^For Respondent : Mr.V.Jaya Prakash Narayanan
Government Advocate (Crl. Side)

:JUDGMENT

The appellant, who was ranked as A-1 along with two others in a sessions trial, wherein all of them stood charged for the offences under S.392 r/w 397 I.P.C. (2 counts), on being found guilty under S.392 r/w 397 I.P.C. (1 count) and sentenced to undergo R.I. for 10 years with a fine of Rs.5,000/- and in default of payment of fine to undergo 1 year R.I. has brought forth this appeal.

2. The short facts necessary for the disposal of this appeal can be stated thus:

(a) P.W.1 Pongiammal, a resident of Aravilakku Mettupalayam, Perundurai Taluk, Erode District, at about 4.00 P.M. on 27.12.1991, was returning to her house from her fields. AT L.P.P. Canal, the accused 1 to 3 came in a motorcycle bearing Registration No.TN 27 Y 4733. A-3 snatched "thalikodi" of P.W.1 worth about Rs.21,000/- at the gun point of A-1. When P.W.1 resisted the same, the appellant/A-1 shot at her and caused injuries on the right shoulder. At that time one Duraisamy Gounder came to the rescue and prevented them to escape. A-1 threatened him with a revolver. Duraisamy Gokunder threw his spade on the accused. A-1 to A-3 fled away from the scene of occurrence. At that time, the cylinder of the revolver held by A-1 fell down. Duraisamy Gounder also sustained injury on his forehead, when the

mirror of the vehicle of the accused dashed on his forehead. On hearing the alarm, P.W.2 Ramasamy Gounder, the husband of P.W.1 and P.W.3 Kadirvel, the son of P.W.1 rushed to the site of occurrence. P.W.1 was taken to the Government Hospital, Erode at about 6.20 P.M., where P.W.5 Dr.Sampathkumar who was on duty, treated P.W.1 a nd intimated to Perundurai Police Station through Ex.P1 intimation. The said Duraisamy Gounder was also given treatment by P.W.5 Doctor. An intimation in that regard was also sent through Ex.P2. The wound certificates pertaining to the injuries found on P.W.1 and Duraisamy Gounder were marked as Exs.P3 and P4 respectively.

(b) At about 6.40 P.M. on receipt of the intimation, P.W.9 Chinnappan, Inspector of Police proceeded to the Government Hospital, found P.W.1 unconscious, recorded the statement of Duraisamy Gounder and obtained his signature in the statement marked as Ex.P11. The Investigation Officer also recovered M.O.3 cylinder of the revolver used by A-1 at the time of occurrence under Ex.P5 mahazar in front of P.W.6 Mohan, Village Administrative Officer. On the strength of Ex.P11, the Investigation Officer registered a case in Crime No.434/91 under Ss 393 and 397 of I.P.C. Ex.P12 printed F.I.R. was despatched to the Judicial Magistrate's Court, Perundurai. P.W.9 Inspector took up the the investigation, proceeded to the site of occurrence, prepared Ex.P6 observation mahazar and Ex.P13 rough sketch, examined the witnesses and recorded their statements. M.O.1 saree and M.O.2 blouse of P.W.1 were recovered at the hospital under Ex.P7 mahazar. The Investigation Officer examined Duraisamy Gounder and recorded his statement and recovered M.Os.4 and 5 clothes worn by him at the time of occurrence, from him. The Investigation Officer examined P.Ws.2, 4 and 6 and also other witnesses and recorded their statements.

(c) All the material objects recovered at the time of investigation were sent to the Judicial Magistrate's Court. On 29.12.1991, P.W.9 examined one Subbian. On 5.2.1992 the Investigation Officer received information from P.W.7 Siril, about the arrest of A-1 in Crime No.35/92 under S.102 of Cr.P.C. in respect of Madurai, Annanagar, Madhichiyam Police Station. The confessional statement recorded therein would indicate the involvement of A-1 in the instant case. But, A-1 was released on bail before the arrest was made in this case. On 11.4.199 2, P.W.9 examined P.W.5 Doctor and recorded his statement. On 8.5.19 92 on information, the appellant was arrested by P.W.9, and he was remanded to judicial custody. On 14.5.1992 P.W.9 made a request for conducting test identification parade, in respect of the appellant to the Chief Judicial Magistrate, Erode. As per the order of the Chief Judicial Magistrate, P.W.8 Mr.Thiagarajan, Judicial Magistrate No.II, Erode, conducted the test identification parade on 25.5.1992 at Central Jail, Coimbatore, wherein P.W.1 and Duraisamy Gounder participated. On 22.6.1992, another test identification parade was conducted by P.W.8, wherein the said Subbian participated. The proceedings of the test identification parade prepared by P.W.8 were marked as Exs.P9 and P10. On completion of the investigation, a charge sheet was laid against the appellant/accused along with two other accused.

3. Before the commencement of the trial, both A-2 and A-3 died, and the case was proceeded against A-1. In order to prove the charge levelled against the appellant/A-1, the prosecution examined 9 witnesses and marked 13 exhibits and 5 material objects. After the evidence of the prosecution was over, the appellant/A-1 was questioned under S.313 of Cr.P.C. as to the

incriminating circumstances found in the evidence of the prosecution witnesses, and the accused flatly denied the same as false. No defence witness was examined. On consideration of the rival submissions and scrutiny of the available materials, the trial Court found him guilty under S.392 r/w 397 I.P.C. (1 count) and sentenced him to undergo imprisonment as stated above.

4. The learned Counsel appearing for the appellant made the following submissions for the consideration of this Court.

The trial Court has found the accused guilty when the prosecution has not proved its case in any manner known to law. According to the prosecution case, at the time of occurrence there were three eyewitnesses namely P.W.1, Duraisamy Gounder and Subbian. The prosecution came with an explanation to tender before the trial Court that it could not examine Duraisamy Gounder, since he deceased. But, for the reasons best known to the prosecution, it has not examined the said Subbian. The occurrence has taken place in the year 1991. P.W.1 was examined after a period of 10 years. The lower Court has pointed out that she has clearly identified the accused at the time of the trial. But, it remains to be stated that she could not identify the accused at the time of the identification parade. The lower Court has also pointed out that as per the evidence of the Judicial Magistrate, who conducted the identification parade, one Duraisamy Gounder and Subbian have identified the assailants properly. But, Duraisamy Gounder was not examined in Court, since he deceased, and the said Subbian was also not examined in Court to identify the accused in Court. P.W.1 has categorically spoken in her evidence that she did not see the accused at that time and could not give the particulars to identify them. Under such circumstances, when P.W.1 could not identify the accused at the time of the identification parade, she could not identify them properly, that too after a period of 10 years before the Court at the time of trial, and hence, her evidence cannot be given weight. In the instant case, there was no recovery of either the weapon used at the time of the occurrence or the gold chain what was the subject matter of robbery. The prosecution relied on the recovery of M.O.3, cylinder of the revolver seized from the site of occurrence. According to P.W.3, it was he who recovered the same and handed over to the Inspector. But, according to the Village Administrative Officer, the same was handed over in his presence by the eyewitness Duraisamy Gounder to the Investigation Officer, and thus, the recovery of M.O.3 from the place of occurrence is highly doubtful. It is pertinent to point out that except the F.I.R. which came into existence in the year 1991, all other statements of all the material witnesses have reached the Court only in the year 1995, but the prosecution has not tendered any explanation in that regard. The test identification parade was conducted at 2 points of time, the first on 25.5.92 and the next on 22.6.92. Thus, there was a long delay, and therefore, no importance can be attached to the said identification parade. The cumulative fact of all the above would clearly show that the lower Court without any basis or the legal evidence has found the accused guilty and convicted him, and hence, the appeal has got to be allowed setting aside the judgment of the lower Court, and the accused should be set at liberty.

5. Opposing the contentions put forth by the appellant's side, the learned Government Advocate would urge that P.W.1 was the injured; that the informant one Duraisamy Gounder who was also an eyewitnesses, could not be examined, since he deceased; that P.W.1 who was the injured and whose property

was snatched away, has given categorical evidence, and she has identified the appellant/A-1 before the trial Court; that it is true that she did not identify the culprits during the identification parade, but it is pertinent to point out that P.W.8 Judicial Magistrate has categorically deposed that both Duraisamy and Subbian have identified the accused all the three times, and it was properly relied on by the trial Court; that the non-recovery of the weapon or the subject matter of robbery cannot be a ground to reject the prosecution case; that it was a case where A-1 has shot at P.W.1 twice with the gun and bullet injuries have been caused; that the medical evidence also corroborates the prosecution case in that regard, and under such circumstances, the lower Court in appreciation of the evidence brought forth has convicted the appellant/A-1, and hence, the judgment of the lower Court has got to be sustained.

6. This Court after paying its sincere attention on the rival submissions made and making close scrutiny of the entire materials available has to necessarily agree with the case of the appellant/A-1.

7. The gist of the prosecution was that P.W.1 when she was coming from her field at about 4.00 P.M., the three accused including the appellant before the Court came in a motorbike, waylaid her and one of the accused was about to snatch her gold chain, and while it was resisted, the first accused shot at her twice and caused injuries on her right shoulder. From the evidence of P.W.1, it would be clear that she has not noticed the identity of the culprits at the time of occurrence. At the time of the test identification parade also, she could not identify the culprits. She was not the informant to the police about the occurrence. But, it was one Duraisamy Gounder. The said Duraisamy Gounder could not be examined by the prosecution since he deceased. According to the prosecution, one Subbian was also an eyewitness, and he had identified the assailants at the time of the identification parade. But, for the reasons best known to the prosecution, it has withheld the evidence of the said Subbian before the lower Court. The non-examination of one of the eyewitnesses namely Subbian who was alive and very well available, would be but fatal to the prosecution case. The Court is of the considered view that it is a fit case wherein adverse inference can be drawn against the prosecution case. It is contended by the learned Government Advocate that P.W.1 was able to identify the assailant before the Court clearly. This contention has got to be discountenanced. According to P.W.1, she did not notice the identity of the culprits at the time of the occurrence. It is pertinent to point out that she was not able to identify the appellant/A-1 at the time of the test identification parade. In such circumstances, the identification made by P.W.1 at the time of trial after a lapse of 10 years will be of no consequence at all, and hence, her evidence in that regard has got to be rejected.

8. In the instant case, all the three assailants were not known to the prosecution witnesses already, and hence, their names could not be mentioned in the F.I.R. Added further, neither the stolen property namely the subject matter of robbery nor the gun what was according to the prosecution, used at the time of occurrence was recovered from the appellant/A-1. True it is that the non-recovery of the weapon or the subject matter of robbery cannot be a reason to reject the prosecution case. But, when this fact is viewed from the other circumstances, the same would cast a doubt on the prosecution case. As rightly pointed out by the learned Counsel for the appellant, except

the F. I.R., which was registered on the date of occurrence in the year 1991, all statements of the material witnesses have reached the concerned Magistrate's Court in the year 1995 after a lapse of nearly 4 + years, and hence, no reliance can be placed on their evidence. In the case on hand, P.W.1's evidence cannot be relied on to find the accused guilty. The evidence of P.W.1 as discussed above cannot form basis to state that the prosecution has proved the nexus between the accused and the crime in question. The identification parade was of no avail to the prosecution, and the statement of Subbian has reached the lower Court after a long time, and the said material witness namely Subbian has not been examined. In view of the above, the Court is of the considered view that it would be highly unsafe to record a finding that it was the appellant/A-1 who was actually involved in the crime in question, and hence, the judgment of conviction and sentence passed by the lower Court has got to be set aside, and the appellant/A-1 is entitled for an acquittal of the charges against him.

9. In the result, this criminal appeal is allowed, setting aside the judgment of the lower Court. The appellant/A-1 is acquitted of the charges against him. The appellant/A-1 is directed to be set at liberty forthwith, if he is not required in any other case.

Index: Yes
Internet: Yes

To:
1) The Additional Sessions Judge (Fast Track Court No.1)
Erode.
2) The Principal Sessions Judge, Erode.
3) The Superintendent, Central Prison, Coimbatore.
4) The Collector, Erode District.
5) The Public Prosecutor, High Court, Madras.
6) The D.I.G. of Police, Chennai 4.
7) Mr.V.Jaya Prakash Narayanan, Government Advocate
(Crl. Side), High Court, Madras.
8) The Inspector of Police, Perundurai Police Station,
Erode District.

nsv/